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In The
Supreme Court Of The United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
Petitioners,

v.

QUINCY CABLE TV, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITION

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The State of Connecticut, sponsored by the Attorney General of the State of Connecticut, submits this brief in support of the Joint Petition For A Writ of Certiorari filed by the National Association of Broadcasters et al., seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Quincy Cable T.V., Inc. v. Federal Communications Commission,* 768 F.2d 1434, attached as Appendix A to the Petition filed herein. The State of Connecticut files this brief pursuant to Rule 36.4 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE, STATE OF CONNECTICUT

The State of Connecticut grants franchises to cable television systems to provide cable television service in Connecticut. According to statute, Connecticut cable franchises require cable operators to serve the "public interest." 47 U.S.C. 521 (2); § 16-331(a), Connecticut General Statutes. The public interest requires that cable operation protect and promote the free speech rights of the listening and viewing public.

The FCC's "must-carry" regulations were designed to further the First Amendment rights of the public in both broadcast and cable television. The decision of the Court of Appeals for the District of Columbia Circuit which is the subject of this Petition for a Writ of Certiorari adversely affects both the State's ability to require Connecticut cable operators to serve the public interest of Connecticut residents and the First Amendment rights of Connecticut residents. The State of Connecticut, therefore, has a direct and substantial interest in this proceeding.

SUMMARY OF THE ARGUMENT

In exchange for the use of the public streets and ways, cable operators are required to operate in the public interest and to be responsive to the needs of the local communities which they serve. 47 U.S.C. 541(b)(1), 521(2). The Federal Communications Commission "must-carry" rules, requiring cable carriage of all local and "significantly viewed" broadcast stations, opened local broadcasting stations and cable systems to the public as local forums for public expressive activity. The regulations, therefore, furthered the public's First Amendment rights in the electronic media.

Cable operation is subject to the same public interest regulation as the broadcast industry. Both industries appropriate portions of the public domain to the exclusion of the public's exercise of its right to free expression. The free speech rights of cable operators, therefore, are secondary to the First Amendment rights of the public.

The Court of Appeals, however, failed to consider the public interest considerations contained in the must-carry rules and erroneously excluded the constitutional rights of the public from cable operation. The Court's decision enhances the voices of a few select individuals in the electronic media at the expense of the many who do not have the opportunity to engage in electronic speech. The Court's decision, therefore, is contrary to the fundamental principles of the First Amendment.

ARGUMENT

I. The Question Presented Is Substantial And Should Be Decided By This Court

The primary goal of the First Amendment is to provide "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press v. United States*, 326 U.S. 1, 20 (1945)) and to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Cable television is a relatively new, but important, component of the "marketplace of ideas." Cable systems provide local television broadcast signals, television signals from distant cities and "new programming services" including "movies and other programs uninterrupted by commercial advertisements . . . sports, news and specialized programming directed to a number of individual segments of the national audience such as children, minorities and senior citizens." *House Report of the Committee on Energy and Commerce*, No. 98-934, 98 Cong., 2d Session (1984); *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984). With the capability to carry over 100 channels of information into the homes and businesses of subscribers, cable systems are becoming, in a very real sense, the electronic marketplace of ideas.

The First Amendment is directed to the rights of both speakers and listeners. The speakers' right to present and disseminate ideas is correlative to the listeners' right to hear from "diverse and antagonistic sources." *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). The relative rights of speakers and listeners is dependent on the medium of expression involved. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

This Court has not had the occasion to consider the free speech rights of speakers and listeners in the field of cable television. Substantial First Amendment questions, however, have been raised through the Courts of Appeals and are currently pending in this Court. The instant case presents the question of the accountability of cable operators to the First Amendment rights of the viewing public. *City of Los Angeles, California, and Department of Water and Power v. Preferred Communications, Inc.*, Supreme Court No. 85-390, presents the related issue of a cable operator's First Amendment right to permanently appropriate portions of the public domain for private business and personal expressive purposes. Both *National Association of Broadcasters v. Quincy Cable T.V., Inc.*, Supreme Court No. 85-502, and *City of Los Angeles, California, and Department of Water and Power v. Preferred Communications, Inc.*, Supreme Court No. 85-390, present issues of substantial public importance. The resolution of those issues will have a profound effect on the public's future ability to exercise its free speech rights in cable communications.

II. The Must-Carry Rules Promote The Free Speech Rights Of The Public In Cable Television

Free speech in terms of the mass media presents special considerations: "differences in the characteristics of the news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). A particular medium of expression is either more or less restricted depending upon the ability of all members of the public to employ that medium. *Community Communications v. City of Boulder*, 660 F.2d. 1370, 1378 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982). "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 392.

The ability to publish a newspaper or pamphlet is available to everyone. The print media, therefore, enjoys the greatest freedom of expression. A newspaper's editorial control over the presentation of its views is not subject to limitation:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

Although the general public has an open opportunity to present its ideas through the print media, the use of radio or television as a medium of expression is not available to everyone. The broadcast frequency is part of the public domain and each individual has an equal right to use that public property for expressive purposes. The broadcast frequency spectrum, however, has a limited physical ability in the number of speakers which it may accommodate. Everyone, therefore, may not broadcast. *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134 (1940). As everyone may not use the public domain for expressive purposes, the free speech rights of those that do are secondary to the First Amendment rights of those that cannot — the listening and viewing public. For this reason, the First Amendment rights of the "viewers and listeners, not . . . the broadcasters, . . . is paramount. It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 390.

The Federal Communications Commission was given the power to regulate broadcasting in the "public

interest." 47 U.S.C. 303. The Commission's regulation under the public interest standard "necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 122 (1973). Under the Communications Act of 1934, therefore, the FCC was given not only the power of "policing the wavelengths to prevent stations from interfering with each other" by "supervising the traffic," but was given the duty "of determining the composition of the traffic." *National Broadcasting Co. v. United States,* 319 U.S. 190, 215-216 (1943).

Congress and the FCC have actively promoted the free speech rights of the public in broadcast television programming. The "fairness doctrine" requires fair coverage of controversial issues, provides editorial reply time to those with opposing views and confers on individuals the right to respond to "personal attacks," *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969). Under the "equal time" provisions of the Communications Act (47 U.S.C. 315), all candidates for public office have an equal opportunity to use broadcast stations. 47 U.S.C. 312 (a)(7) provides candidates for federal public office with the right of reasonable access to broadcast facilities to present their candidacies. *CBS, Inc. v. Federal Communications Commission,* 453 U.S. 367 (1981).

In accord with its responsibility to promote the public interest, the FCC issued its "must-carry rules," requiring cable operators to transmit the signals of all local or "significantly viewed" broadcast stations in their cable franchise area. 47 C.F.R. §§ 76.57-76.61 (1984). The public interest goals contained in the regulations were two-fold: 1) to limit the competitive risk which cable posed to the public's receipt of "free" conventional broadcasting, and 2) to encourage the growth and development of local broadcasters as "outlets for local expression." *First Report and Order,* 30 FCC 683 (1965); *Second Report and Order,* 2 FCC2d 725 (1966); *United States v. Southwestern Cable*

Co., 392 U.S. 157 (1968). The FCC's second goal, coupled with the operation of broadcasting policies such as the "fairness doctrine," opened more local broadcasting stations and cable systems to the public as local forums for public expressive activity.[1] The FCC's must-carry rules, "encouraged diversified programming suitable to the communities needs," (*United States v. Midwest Video Corp.*, 406 U.S. 649, 666-669 (1972)) and helped to make cable systems "responsive to the needs and interests of the local community." 47 U.S.C. 521(2). By increasing "diversity" and the responsiveness of cable systems to local communications needs, the FCC regulations directly furthered the public's right "to have the medium function consistently with the ends and purposes of the First Amendment." *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 798-802 (1978), *Red Lion Broadcasting Co. v. F.C.C.*, *supra*, 395 U.S. at 390.[2]

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[1] Where the FCC formerly had jurisdictional authority over cable "ancillary" to its power to regulate broadcasting (*United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)), the FCC now has direct authority to regulate cable operation "to assure that cable communications provide . . . the widest possible diversity of information sources and services to the public." 47 U.S.C. 521(4).

[2] The FCC must-carry rules are content neutral. The cable companies' signal carriage requirement is not based upon the "content" of the programming carried by broadcast stations. Their "purpose and effect is to promote free speech, not to restrict it." *F.C.C. v. National Citizens Committee for Broadcasting, supra*, 436 U.S. at 800-801. While it has been argued that the must-carry rules no longer further the public interest under the current state of cable development, that is a matter of judgment and presents an issue wholly different from the constitutional rulings made by the Court of Appeals. *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *CBS, Inc. v. FCC, supra*, 453 U.S. at 390. If the "public interest" requires a change in the must-carry regulations, then a regulation adoption process before the FCC, where the free speech rights of the public are considered, would be appropriate. The Court's "constitutional findings," however, now preclude any proper administrative analysis of the must-carry rules.

The Court of Appeals, however, has concluded that the "must-carry rules" violate cable operators' First Amendment right to carry whatever programming they choose. Additionally, the Court found that the rules violate the First Amendment rights of cable programmers because the regulations purportedly give preferential access to the cable medium to broadcast stations. The Court's interpretation of the First Amendment in relation to cable programming is erroneous. The Court's conclusions are the result of a misreading of this Court's decisions and a misunderstanding of fundamental First Amendment principles.

III. The Court Of Appeals' First Amendment Analysis Ignores The Free Speech Rights Of The Public

Public interest regulation of the broadcast industry has been repeatedly sustained by this Court because the "limited facilities" of broadcasting are "not available to all." *National Broadcasting Co. v. United States, supra,* 319 U.S. at 226. The Court of Appeals, however, ruled that the First Amendment principles applicable to broadcasting cannot be transferred to cable because of a cable system's capacity to "simultaneously" carry many more signals than broadcasters. Cable operators, therefore, are not "privileged occupants of a physically scarce resource" and have no status "as fiduciaries of the public's interest." Appendix A, p. 31a. The Court's reasoning is plainly wrong.

Contrary to the finding of the Court of Appeals, the "scarcity rationale" is not dependent on the number of signals that an electronic speaker may employ. Instead, "scarcity" is based upon the *number of speakers* that may occupy a particular electronic forum. "Scarcity" simply means that if *everyone* cannot use the public domain for expressive purposes, then the free speech rights of those that do are secondary to the First Amendment rights of those that cannot. *National Broadcasting Co. v. United*

States, supra, 319 U.S. at 226-27. This principle is applicable to broadcasting because a broadcaster's use of a portion of the public domain—the particular bandwidth of the broadcast frequency spectrum—excludes use of that portion of the frequency spectrum by others with equal First Amendment rights. The fact that the full range of the frequency spectrum may accommodate its use by others does not relieve individual broadcasters from public interest regulation. *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 399.

Like broadcasting, and unlike newspapers, cable must employ the public domain—the public streets and ways—to exist. A cable operator's use of that public domain constitutes a "permanent physical occupation" of that property (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)) and excludes expressive use of such property by other members of the public with an equal First Amendment right of access. "The use which the [company] makes of the streets is an exclusive and permanent one . . . It as effectively and permanently dispossesses the general public as if it had destroyed that amount of ground." *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98-99, (1893), quoted in *Loretto v. Teleprompter Manhattan Cable, supra*, 458 U.S. at 428-429. *Disruption* of the public streets and ways allows for government regulation of cable to promote public safety and limit public inconvenience. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982). A cable system's *appropriation* of the public domain allows for government regulation to further the First Amendment rights of the public.

The Court's finding that a cable operator may carry 100 programs "simultaneously" while a broadcaster may only carry one is a distinction without a difference in terms of the First Amendment. While there may or may not be "scarcity" *within* the cable wire, there is a practical physical limit on the number of cable wires that may

traverse the public domain.[3] The First Amendment common denominator between broadcasting and cable operation is not the number of signals that each medium may transmit, but, instead, is the number of speakers that may "sit astride" the channels of communication. In both broadcasting and cable only one or a few speakers may occupy the public domain. Their appropriation of the public domain excludes the expressive activity of the general public.[4] Like broadcasters, therefore, cable operators' programming is subject to regulation in the public interest. Under the Communications Act, that regulation demands that the public's First Amendment rights be "paramount." *Red Lion Broadcasting Co. v. F.C.C., supra,* 395 U.S. at 390.[5]

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[3] If each member of the public chose to exercise the right to operate a cable system, a wall of wires would extend down every street. The result of the public's exercise of its right to speak over cable would, therefore, create a situation as chaotic as occurred in the early days of broadcasting. *Community Communications Co. v. City of Boulder,* 660 F.2d 1370 (10th Cir. 1981); *Berkshire Cablevision of Rhode Island, Inc. v. Burke,* 571 F.Supp. 976 (D.R.I. 1983).

[4] First Amendment principles are blind to economic forces. Although "economic scarcity"—the inability of everyone to afford to operate an element of the mass media—cannot limit a speaker's First Amendment rights (*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241), the converse is also true. The inability of everyone to afford to use the public domain for expressive purposes does not confer exclusive free speech rights on those that can afford to speak. *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 399. *Columbia Broadcasting System v. Democratic National Comm.,* 412 U.S. at 123.

[5] Both this Court and Congress have specifically provided for cable programming requirements to further the public's First Amendment right to diversity. *United States v. Midwest Video Corp.,* 406 U.S. 649, 668-669—local origination requirement ensures "suitably diversified programming" and provides for "[l]ocal program service," a "vital part of community life."

(continued)

The Court of Appeals' additional conclusion that neither "natural" nor "economic monopoly" theories support government regulation of cable programming is beside the point. Contrary to the Court of Appeals' reasoning, monopoly status is not the touchstone for public interest regulation. The fact that more than one broadcast station is capable of serving the same area does not diminish the public's free speech rights in that medium. The fact that the broadcast frequency spectrum may accommodate use by others does not give each broadcaster a First Amendment right to a license. *Red Lion Broadcasting Co. v. F.C.C., supra*, 395 at 399-401. Like broadcasters, cable operators occupy a "preferred position" for expressive activity in the public domain. As in broadcasting, the fact that the public domain may support one or more cable operators does not give any operator a First Amendment right to appropriate that portion of the public domain which his or her wires must necessarily occupy. Just as the right to speak in public parks and meeting places cannot be selectively conferred on certain individuals (*Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-516 (1939)), selected individuals have no constitutional right to permanently occupy the new electronic parks and public meeting places of this country to the exclusion of the expressive rights of others. "Some present possibility for new entry by competing stations is not enough . . . to render unconstitutional the Government's effort to assure that" cable operators "serve the public interest." *Red Lion Broadcasting Co. v. F.C.C., supra*, 395 U.S. at 400. The physical ability of utility poles to support more than one cable wire, therefore, does not excuse the few who "sit astride" the channels of communication from regulation in the public interest.

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5 continued

Leased access and public access channel requirements (47 U.S.C. §§ 531, 532) will provide "a wide diversity of information sources to the public—the fundamental goal of the First Amendment." *House Report, supra*, page 30; 1984 U.S. Cong. and Ad. News 4667.

The Court of Appeals was faced with the competing First Amendment rights of three groups—cable programmers (Turner Broadcasting network), cable operators (Quincy Cable Television, Inc.), and the public. The Court of Appeals failed to realize that the rights of broadcasters were not in issue—the "must-carry" rules made broadcast signals a proxy for the free speech rights of the public. The Court's analysis erroneously ignored the public's First Amendment interests and concluded that the must-carry rules favored "one group of speakers" (broadcasters) "over another" (cable operators and programmers). By failing to consider the public's free speech rights in broadcasting and cable, the Court's decision does exactly what it intended to avoid. Private cable operators' and cable programmers' free speech rights are enhanced at the expense of the free speech rights of the public—a concept "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

The relevant and ultimate question which must be resolved is whether the regulations continue to serve the "interest of the public"—not whether they serve the interests of either broadcasters, cable operators or cable programmers. *Columbia Broadcasting System v. Democratic National Committee, supra*, 412 U.S. at 122. This question must be decided in an administrative proceeding where the primary consideration is the establishment of rules designed to enhance the public's free speech rights in the electronic media. The Court ignored this basic principle and skewed any possible future administrative action by positing a constitutional test which requires the public interest to prove itself against claimed First Amendment rights of select individuals. Ironically, and unfortunately, the Court of Appeals has placed the burden of proving the constitutional validity of regulations designed to further the First Amendment on those that the First Amendment was designed to protect—the listening and viewing public. Having been excluded from the use of the broadcast and cable mediums, the public must now either demonstrate

why its interests do not infringe on the "rights" of those who have appropriated the public domain or idly watch as the First Amendment right to speak is divided among those who have achieved preferred positions for expression at the public's expense. Irrespective of the Court of Appeals' conclusions, the constitution does not sanction the disenfranchisement of the public from the electronic media: "Freedom to publish means freedom for all and not for some." *Associated Press v. United States, supra,* 326 U.S. at 20.

Cable television is rapidly becoming the "market place" for electronic speech. According to the Court of Appeals, participation in that marketplace—and the consequent information sources which will be available to the listening and viewing public—depends solely upon the "editorial discretion" of cable operators. The First Amendment, however, does not "countenance monopolization of that market by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. F.C.C., supra,* 395 U.S. at 390. Cable programming regulations which are designed to increase diversity and to expand the number of local outlets for public expression do not offend the First Amendment. Instead, such regulations protect against "unlimited private censorship . . . in a medium not open to all." *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 392. It is those that aspire to be private censors and not the public who should be required to demonstrate that their activities in the electronic marketplace serve the First Amendment.

CONCLUSION

For the above-stated reasons, a writ of certiorari should be issued to the United States Court of Appeals for the District of Columbia Circuit.

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